In the Supreme Court of the United States,

DECEMBER TERM, 1867.

GEORGE A. GARDNER, plaintiff in error,
vs.
HIRAM BARNEY, collector, &c. } No. 106.

Argument for defendant in Error.

FIRST PROPOSITION.

INDEPENDENTLY OF THE EFFECT OF THE JOINT RESOLUTION APPROVED JANUARY 11, 1862, THE ACT ENTITLED 'AN ACT TO INCREASE THE DUTIES ON TEA, COFFEE, AND SUGAR,'' WAS A VALID AND OPERATIVE LAW AT THE TIME OF THE ENTRY OF THE MERCHANDISE MENTIONED IN THE PLAINTIFF'S DECLARATION.

I.

The statute in question provides for itself that it shall take effect ''from and after the date of the passage of this act.'' Now, the word *date* has two distinct meanings. In the first place, it denotes the letters or figures, written or printed, which express, specify, or announce a *point of time* at which an event occurred, as the date of a letter, of a will, of a

deed, etc. This is the primary meaning, and is derived from the Latin *datum*, formerly used in deeds, &c., at the commencement of the sentence expressing the time of execution, &c., as *datum die vicesimo, &c.*, (Johnston's, Worcester's, Webster's Dict.) In a secondary sense, the word is used to denote the *time itself* as when we say an act was performed at such a date, meaning not necessarily the *exprcssed* date, but the time. (Ibid.)

The words "date of the passage," etc., in this statute, mean the *time* of the passage—that time, of course, to be evidenced in the proper way, whatever it may be. We find, then, in the very act in question, an example of the use of the word "date," as convertible with the word "time," and significant of a chronological fact only, and not of a record, certificate, or notation of a fact, chronological or otherwise.

It is clear, then, that if an act of Congress is to take effect from the date of the approval of the President, the meaning is, that it shall operate from the time when he approves it, (3 Days, R. 58,) that time, however, it may be conceded, to be ascertained upon some rule of evidence applicable, if not peculiar, to the subject.

It is not denied that the notation customarily made by the President of the time when he actually approves and signs a bill is a good rule for determining that time. It was originally the best evidence the nature of the case admits of. Usage has made it a rule of unquestionable prevalency. The question, however, is not whether it is the best kind of evidence, but whether it is the only possible competent evidence.

The issue is, whether that evidence is so essential that, in the absence of it, the fact shall be conclusively presumed the contrary. Such a requirement could only be upheld by an express and stringent provision of the Constitution itself. The subject in hand suggests an example of such a stringent provision. The approval of the President is the essential fact for the validity of a law. Yet the President may approve through all imaginable solemnities, and publish his approval through all possible channels of notoriety, yet he shall be deemed and held not to have approved in the constitutional sense, unless, besides approving, he "*shall sign*" the bill. But this is because the Constitution expressly requires it. His signature upon the roll of a bill is, therefore, the only evidence of his approval. The Constitution excludes all other proof of the fact.

But this fact cannot, any more than any other fact, happen without happening on some particular day. The Constitution provides:

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. If he approve, he shall sign it; but if not, he shall return it," etc. May we read this as if it should say, "If he approve, he shall sign it, and shall write down, by the day, month, and year, the time when he approves it?" Either we must find these, or equivalent words in the clause, or else we must find a requirement for signature, and no requirement for date. There is a time, of course, susceptible of being marked by a date, when, if he did approve and sign, the approval was made and the signature

written. The Constitution requiring these two things expressly, and not requiring the notation of the time expressly, what becomes of the approval and the signing on the hypothesis that the dating is also requisite? We would be coerced into the absurdity that two things, which were done in conformity to the Constitution, should be treated as not done at all, unless a third thing was also done which the Constitution had not prescribed.

But again:

The clause provides: "Every bill, which shall have passed, etc., shall, before it become a law, be presented to the President of the United States; if he approve, he shall *sign* it; but if not, he shall return it, with his objections; to that House in which it originated, who shall enter the objections at large on their journal," etc. Is the President required to date his act of returning the bill? Why not? If the duty of dating his signing is to be deduced from the Constitution, so must his duty of dating his return of it, with objections, for both the signing and the returning are expressed without qualification, and in a necessary, logical, and grammatical connection common to both.

It is no answer to this that the importance of dating the signature and approval is greater than that of dating the return. That argument is to be met by the Constitution, and must be concluded by its *terms*.

It is said that there are three branches of the Legislature, and that each keeps its own record.

In the first place, it is not true that any portion of the legislative power of the National Government is vested in the President. The theory of his constitu-

tional negative on the laws, as expounded by Mr. Justice Story, independently of the express words of the Constitution, that "all legislative power herein granted shall be vested in a Congress of the United States," repels the idea that in exercising that power he performs a legislative function. (1 Story on the Constitution, 884.) "A mere parchment delineation of the boundaries of each department is wholly insufficient for the protection of the weaker branch, as the executive unquestionably is; and hence there arises a constitutional necessity of arming it with powers *for its own defence.* If the executive did not possess this qualified negative, it might gradually be stripped of all its authority, and become what it is well known the governors of some of the States are, a mere pageant and shadow of magistracy." (Story, ibid.)

If anything were wanting to show the absurdity of drawing arguments from the theory and practice of the English constitution to assist us in expounding the nature of our own, it would be found in the provision of our Constitution for a law going into operation merely by the non-action of the President. For it is idle to pretend that when a statute becomes a law by ten days silence of the Executive, he is "presumed to consent" in any other sense than a a citizen. If that were so, why require his approval, and a verification of it by his signature.

The two houses keep a record and a chronological record. The President may do so too, by way of diary, or otherwise, as he may choose. So might the houses. But that is not the theory on which they do this. The reason why the Senate and the House of Representatives keep a journal of their proceedings

is *because the Constitution says that they shall*, and that they shall publish it from time to time, etc. (Clause 3, section 4, article 1.) But no such requirement is contained in the Constitution for the proceedings of the executive department, except as it warrants statutes of Congress providing for the several officers of the executive administration all necessary and proper methods of record. No statute requires the President to keep a journal of his acts in relation to approving or vetoing acts of Congress. The only record he is required to make is to *write his name upon a bill* when he approves it, or to prepare and transmit, with it his objections, when he vetoes it.

¶ He is not required to write the word "*approved*," and yet it is customary for him to do so. The Constitution says, if he approves, he *shall* SIGN. It requires nothing but his signature. The word "*approved*" is mere surplusage. His signing is conclusive and official evidence of his approval. No other evidence of approval is admissible, because the Constitution prescribes the rule of evidence, and that rule excludes the competency or admissibility of all other evidence of the fact of approval; and for the same reason, and to the same extent, is the *date* of approval in a legal sense, mere surplusage. In a practical sense it may be, and is very important, as evidence of the time when the approval occurred, and when the bill consequently became a law. The best evidence of that time is the contemporaneous memorandum of the signer himself. Usage has uniformly accepted that memorandum, not as a record perhaps, but as the best evidence the nature of the case admitted. But what is the rule when the usual and conclusive evi-

dence of the time of signing is absent? The bill has been approved and has gone into effect, because the conclusive and final proof of the approval, to wit, the record of it, by signing, is present on the roll. The only question is, when that took place. That it *did* take place is certain. If it did so take place the consequences prescribed in the Constitution must also have taken place. The bill has become a *law*. Shall all this be nullified—declared not to be, or to have been at all—the approval, the signing, the going into effect of the bill as a law, contrary to the unquestionable record truth of the case, rather than admit the best attainable evidence of the day when the final act was done? The question seems to carry its own answer.

II.

(*a.*) But conceding that the time of the approval of a bill can only be proved by the record, we contend that the "record" consists of the *recorded proceedings* connected with, and leading to, and following after, the law, and that all these may be resorted to for the purpose of determining the time when the approval of the President occurred. The Journals of Congress, the records and files of the office of the Secretary of State, are undoubtedly records which the court will inspect, when produced from the proper custody, or printed by proper authority. but as Greenleaf

In the MATTER OF WELMAN, (20 Vt. 656,) the court said: "It may be necessary and admissible in some instances, particularly when an act becomes a law by not being either signed or returned with objections, to carry back the *inquiry to the legislative journals.*

But it would be unsafe, as it would be unfit, to allow the commencement of a public law, whenever the question may arise, to depend on the uncertainty of parol proof, or upon anything extrinsic to the law and *the authenticated recorded proceedings in passing it.*"

The court may inspect the legislative journals to correct clerical mistakes, or carelessness and omissions.—(Supervisors *v.* Heenan, 2 Minn. R. 330; Turley *v.* County of Logan; 17 Ill., 151.)

Even to correct an erroneous entry of the date of approval.—(Fowler *vs.* Peirce; 2 Cal., 165.)

The court may go behind the statute book, and inquire whether an act, coming within the two-third clause of the Constitution, have passed by the requisite number of votes.—(People *vs.* Purdon; 2 Hill. Hunt *vs.* Alstyne; 25 Wend.)

Parol evidence will be received that an actual signing of the bill, as approved, was done by mistake.—(People *vs.* Hatch; 19 Ill., 283.)

The legislative journals will be examined to ascertain whether an act was passed by *ayes* and *nays*, and if the journals do not expressly show this, the act will be held void.—(Spangles *v.* Jacobs, 14 Ill., 297.)

In Pennsylvania, the constitution does not require a bill to be signed by the Speakers of the two Houses of the Legislature; and it was there held, that the signatures, though proper, were not essential to the validity of the law. The fact of its passage and *approval*

was held to be provable by the certificate of the Secretary of State that the bill was duly enrolled in his office.—(Speer *v.* Plank Road Co., 10 Harris, 378.)

The opinion of the court, in this case, might be applied, *mutatis mutandis*, to the question here under consideration.

"There is nothing in the Constitution requiring the signatures of the presiding officers of the two houses to be annexed to a bill preparatory to its becoming a law. Neither is there any general statute to this effect. Each branch of the legislature, by its own rule, has adopted this as a safe and covenient method of signifying to the governor what bills are ready for his approval or rejection, and for this purpose the practice is one of great utility, serving, as it does, to guard against mistake or imposition; but the signatures are no part of the law-making power, and their absence detracts nothing from the force of the enactment."

(b) We admit all that is claimed as to the point that no proof can be admitted to vary the language of a law. But we insist that *the certificate of time* is no part of *the law*, and we do not propose to vary any language but only to supply a blank.

The case of *Young vs. Thompson*, (14 Ill. 381,) cited on the other side, was the case of a sheriff's deed held void, because the court record did not set out the year it was rendered.

The court held the deed void, that no parol evidence as to the year was admissible. This is not applicable here, for *the record to* which we resort does in terms set out the year.

In the case referred to, there was nothing upon *any* part of the record to amend by or to show the truth Here the case is different. If in that case if the year had appeared any where, it would have been sufficient.

It is argued that the original roll which is merely filed in the Secretary of State's office is *the record.*

But we hold that if the original roll is a record, yet the journal is also a record. So is the entry on the back of the roll "filed on such a day" a record. And, whether records or not, they are yet written solemn authoritative entries of facts occurring, precisely like the records of court, and doubtless import absolute verity.

III.

There is abundant *record evidence* extant of the day of the date of the approval of the law in question.

I. THE LEGISLATIVE JOURNALS.

House Journal 37 Congress 2d session:

P. 117, Dec. 23, 1861, bill introduced and *passed.*

P. 124, Dec. 23, 1861, bill from Senate concurred.

P. 125, Dec. 23, 1861, bill enrolled and signed.

P. 132, Jan. 6, 1862, *message from Pres't that on the 24 Dec. last, he had approved and signed the bill.*

P. 138, same day. Resolution introduced and passed to explain the *bill passed on Dec.* 24, 1861.

(See 12 State L'g'e, 611.)

P. 159, Jan. 9, 1862, mess. from Senate concurred Res. to amend act 24 *Dec.*, 1861.

P. 167, Jan. 13, 1862, mess. from Pres't that he had approved Res. to amend act 24 *Dec.*, 1861.

Senate Journal doubtless contains the same.

Here is (1) the *Journals.*

Here is (2) the resolution of Jan. 11, 1862, *reciting* the act of 24 Dec. 1861.

2. *Copy of the Original Roll at State Department.*

Received, 26th December, Thirty-seventh Congress of the United States, at the second session, begun and held at the city of Washington, in the District of Columbia, on Monday, the second day of December, one thousand eight hundred and sixty-one.

And act to increase, &c.

* * * * * *

GALUSHA A. GROW,
Speaker, &c
H. HAMLIN,
Vice President, &c.

Approved December 24.

"ABRAHAM LINCOLN.

Copy of Docket kept in Roll Room, in State Department.

37TH. CONGRESS, 2ND. SESSION. PUBLIC ACT.

A. D.	When Rec'd.	No. of Bill.	No. of Act.	Title and date of approval.
1861.	*	*	*	*
	26th Dec...	H. R. 17....	Public 2....	An act to increase the duties on tea, coffee, and sugar, approved December 24, (1861.)
	*	*	*	*

Second Proposition.

But the Joint Resolution of January 11, 1862, rendered this act valid and operative from the date of the Joint Resolution.

I. The argument in favor of this view of the effect of that Joint Resolution is so clearly and ably stated by Mr. Justice Nelson in his opinion delivered in the Circuit Court, that we are content to rest it upon the statement and reasoning of that learned Justice. His opinion is as follows:

"By a joint resolution passed by both houses of Congress, and approved by the President January 11, 1862, this Act was referred to by its title as having been passed on the 24th December, 1861, explaining and modifying its provisions. By the act as passed, the increased duties were chargeable, according to the true construction of it, on all teas that had not passed the Custom-House, and which were subject to duty from and after the passage of the act. Its operation was not restricted, as perhaps is usual in the amendment of these revenue laws, to goods imported after its passage. Hence teas already imported, or on board ship, or in warehouses, are liable to this enchanced duty. The joint resolution qualified the act, as respected teas in warehouses at the date of its passage, and directed that the Secretary of the Treasury permit them to be withdrawn on payment of the duty of fifteen cents per pound under the previous act of 5th August, 1861, and also directed him to refund any excess of duty, "any laws or parts of laws, to the contrary notwithstanding."

Now, we agree with the learned counsel for the plaintiff, that the mere recital of the title of a former act in a subsequent one, without any words indicating an intent of re-enactment or repeal, can have no such effect; and, if the former act was inoperative for any cause, the recital would not cure the defect. But, if

the former act is referred to in the subsequent one, with words indicating an intent to supply an omission, or to *amend the same in any particular*, then the former is confirmed. The two acts must be taken together, the former must be read with the amendment incorporated into it; and, from the time, at least, of the amendment, must be taken and construed as if the amendment had originally been a part of it. This must necessarily be so, else the amendment itself would be nugatory, and the intent of the legislature defeated. Hence, if the former act be void and inoperative for any cause, a subsequent amendment virtually, if not expressly, re-enacts it; for, we must take the former act with the amendment both together, as giving expression to the legislative will.

This is familiar doctrine.

Now, looking at the joint resolution of January 11, 1862, it will be seen that it contains something more than a mere recital of the title of the previous act. Its legal effect and operation are changed by limiting the payment of the increase of duties to teas imported after the passage of the act, and it carries out this change practically, by providing for a re-imbursement of the excess of duties paid under it previous to the alteration, and concludes with a clause repealing any thing in the former act to the contrary.

Although this joint resolution purports to be in explanation of the previous act, it is in effect, an *amendment* of it, by an alteration of one of its material provisions. But whether viewed as explanatory, or as an amendment, in the technical sense of the term, it is impossible to say that it was not *the intent* of the legislature that the previous act, with the explanation or amendment, should, from that date, operate as a law under which the duties imposed by it were to be collected. If not, why explain or amend it? Why, even explain and interpret an act which the legislature did not intend should operate as valid law? It seems to me that, whether the words of the joint resolution be taken as explanatory or amendatory,

they indicate an intent of the legislature, unmistakably, that the act thus explained or amended, shall be a law of the land, and if, for any cause like the present one—the want of a date—it should be deemed inoperative, the explanation or *amendment* will render it valid, at *least from the date of the passage of the same.*"

See opinion of MARSHALL, C. J., in P. M. GEN'L *vs.* EARLY, (12 Wheaton, 148,) as to the effect of a declaratory law, and of a statute expressing the sense of the legislature on the existing law.

II. But the learned counsel for the plaintiff in error contends that the Joint Resolution of January 11, 1862, is unconstitutional and void, on the ground that it is a measure for raising revenue, and that Congress can only constitutionally raise revenue by *bill.* If we understand his argument, it is this: that, as the Constitution speaks of *bills* for raising revenue, it prohibits *joint resolutions* and other methods by which the *legislative* will is declared and expressed.

The provision is, "all *bills* for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other bills."

We submit that if the term "bills" is used in this provision in the restricted sense, and as not embracing joint resolutions, there is warrant for the construction, that the Constitution does not prohibit joint resolutions for raising revenue from originating in the Senate.

The provision is, *bills* for raising revenue shall originate in the House. Now, if "bills" means what the learned counsel contends, then Joint Resolutions for the same purpose are not prohibited from originating

in the Senate, and the very living spirit of the Constitution may be destroyed by the introduction of such measures into that branch of the legislature which it was intended to exclude from all cognizance of them in the first instance.

It is palpable that the term "bills" was used as comprehending all forms and methods by which the *legislative will* is declared and expressed.

The purpose of the framers of the Constitution in providing that "every order, resolution or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President," etc., is stated fully and correctly by Mr. Justice Story. He says: "If this provision had not been made, Congress, by adopting the form of an order or resolution, instead of a bill, might have effectually defeated the President's qualified negative in all the most important portions of legislation." (1 Story on Constitution, 892.)

This is the entire scope and effect of the provision mentioned. They are words of amplification, meant to prevent an evasion or misconstruction of the Constitution under an erroneously restricted application of the term "bills."

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Special Counsel of United States.